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Supreme Court, U.S.
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No. 98-1894

IN THE

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the California Coastal Commission engage in a temporary taking where the property owner was not prevented from building a house on her residential lot but prevented only from grading in a ravine on that lot pending resolution of a jurisdictional controversy?

LIST OF PARTIES

Peggy Ann Buckley, the petitioner

John Buckley, Peggy Ann Buckley's former husband and a separately represented party in the proceedings below

The California Coastal Commission, an agency of the State of California, created pursuant to the California Coastal Act (Cal. Pub. Resources Code §§ 30000 *et seq.*), the respondent

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OPINION BELOW

The petition seeks review of a final decision of the California Court of Appeal, Second Appellate District, Division Two, which is in a published opinion reported as *Buckley v. California Coastal Commission*, 68 Cal. App. 4th 178, 80 Cal. Rptr. 2d 562 (1998).

STATEMENT OF THE CASE[1]

Petitioner Peggy Ann Buckley and John Buckley (the Buckleys) own a 2.75-acre residential lot in the Point Dume area of Malibu.[2] The lot is rectangular in shape, running lengthwise from east to west. The front portion of the lot, which borders the street, is on the east and is level. The rear or west portion descends rather steeply into a ravine. The Buckleys wanted to build a house on the front portion. Their original plan called only for grading and building on the front portion. There would be no development in the rear. (App. 2-4.)

The front portion of the lot is situated in what has come to be referred to as a "Calvo exempt" area. The name comes from the state legislator who sponsored legislation, codified in California Public Resources Code §§ 30610.1 and 30610.2, providing an exemption from the Coastal Commission's permit jurisdiction. The exemption is for the

1. The statement of the case is taken from the reported opinion below. Citations to that opinion, which is appended to the Petition for Writ of Certiorari, will be provided by referring to the Appendix (App.) and the page number.

2. Whether the ownership of the property has changed as a consequence of the Buckleys' divorce is not shown by the record.

limited purpose of constructing a single-family residence and applies to certain areas designated by the Coastal Commission that meet certain geographical criteria. When designating "Calvo exempt" areas, the Coastal Commission included in the exempt area the front portion of the Buckleys' lot, but excluded the rear portion because it was "environmentally sensitive." The Coastal Commission informed the Buckleys that under these designations, they did not need a coastal development permit to build a single-family residence on the front portion of their lot. They would, however, need a coastal permit for any development on the rear portion and any development other than a single-family residence on the front portion. (App. 4.)

The Buckleys later decided that in addition to grading the front portion of their lot in preparation for construction of a single-family home, they would grade the rear portion to provide pads for a garden, a riding ring or a tennis court, and a guest house. They applied for a coastal permit for the grading in the ravine. At the hearing before the Coastal Commission on their permit application, the Buckleys for the first time voiced their belief that the grading in the ravine was required to alleviate a landslide. The Coastal Commission denied the permit application on the ground that the extensive grading proposed by the Buckleys was inconsistent with the environmentally sensitive habitat policies of the Coastal Act. The Buckleys did not challenge the permit denial. (App. 5-6.)

Notwithstanding the Coastal Commission's denial of the permit, the Buckleys began grading the rear portion of their lot pursuant to their extensive grading plan that had been approved by the County of Los Angeles. The Coastal Commission issued an order to the Buckleys to stop the

grading until they obtained a coastal permit. Then a County geologist ordered the Buckleys to abate the landslide on the rear portion of their lot by pursuing the County-approved grading plan. The Buckleys sought an emergency permit from the Coastal Commission to pursue this grading plan. The Coastal Commission denied the application because the County-approved plan provided more grading than was needed to abate the hazard created by the landslide. When the Buckleys continued with the grading in the ravine, the Coastal Commission issued another stop-work order. (App. 6-8.)

The Buckleys filed a declaratory relief action against the Coastal Commission contending, contrary to their position during the Commission's permit hearings, that the Coastal Commission lacked jurisdiction over any development on their property. The Coastal Commission sued the Buckleys to enjoin the grading and to impose civil penalties for the impermissible activity. The Buckleys cross-complained for damages. The cases were consolidated. The declaratory relief cause of action was severed so that it could be tried first. The trial court ruled that the Coastal Commission had no jurisdiction over any portion of the Buckleys' lot. Based upon this determination, the trial court then ruled that the Coastal Commission's mistaken assertion of jurisdiction was a permanent taking of the Buckleys' lot and ordered that the case proceed to trial on the amount of damages that should be awarded for this taking. The trial court awarded the Buckleys $1,355,837 in damages and $831,494.76 in attorney fees. (App. 8.)

The Court of Appeal initially affirmed the trial court's determination that the Coastal Commission had no jurisdiction over the rear portion of the Buckleys' lot and

reversed its determination that the mistaken assertion of jurisdiction was a taking. The Court of Appeal premised its finding that there was no taking on substantial evidence in the record that the Buckleys were not deprived of economically beneficial use because they were free at all times to build their house on the level front portion of their lot. The Buckleys petitioned the California Supreme Court for review of the Court of Appeal's decision. The California Supreme Court granted the petition and then remanded the case to the Court of Appeal for reconsideration in light of its decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841 (1998), *cert. denied*, 119 S. Ct. 179 (1998). (App. 37.) On reconsideration, the Court of Appeal, this time citing *Landgate*, reaffirmed its determinations that the Coastal Commission had mistakenly asserted its jurisdiction and that there was no evidence that the delay occasioned by the mistaken assertion of jurisdiction deprived the Buckleys of substantially all economically beneficial use of their lot. (App. 20-32.) The Buckleys again petitioned the California Supreme Court for review. Their petition was denied. (App. 36.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO ADDRESS HOW THE *BUCKLEY* DECISION PRESENTS AN ISSUE SUPPORTING THE GRANT OF CERTIORARI

The Petition for Writ of Certiorari is largely a diatribe setting forth the petitioner's opinion of regulatory takings law in California. The premise of the petition is that the

grant of a writ of certiorari is warranted simply because *Buckley* is an inverse condemnation case decided by a California court. The petition is directed primarily at the California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006, *cert. denied*, 119 S. Ct. 179 (1998). The *Landgate* petition, however, already has been denied. The California Court of Appeal, acting at the direction of the California Supreme Court, cited *Landgate* in confirming its initial decision that the facts in *Buckley* fail to show that there was a temporary taking. It is the *Buckley* case, however, for which review is being sought, and the *Buckley* case is one in which there is no substantial evidence to support a taking.

The portion of the petition arguing the reasons why the writ should be granted in this case consumes twenty-three pages. Only six of those pages even address the *Buckley* decision. More importantly, nothing in those six pages explains how *Buckley* fails to apply correctly this Court's takings decisions or how *Buckley* conflicts with those decisions. The six pages ignore the *Buckley* court's determination that there was no evidence supporting a finding that the Coastal Commission's actions denied the Buckleys all economically beneficial or productive use of their land, the basis for finding a taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). There is nothing about how the delays in *Buckley* were not "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" and, therefore, not temporary takings under *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). Finally, there is no attempt to show that the Coastal Commission did more than assert its regulatory jurisdiction to require a permit before grading was begun and, therefore,

extended its actions beyond those found not to be a taking in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985).

The six pages relating to *Buckley* simply say that the Buckleys were faced with a choice of either surrendering their constitutional rights to build on their land or surrendering their right to be compensated for the taking of their land. That is hardly how the California Court of Appeal described the situation. The Buckleys were free to build their home on the level front portion of their lot, over which the Coastal Commission acknowledged it had no jurisdiction, while they pursued their challenge to the Coastal Commission's assertion of jurisdiction over the rear portion of their lot through the judicial process. (App. 20-25.) This Court does not retry issues of fact determined by a competent state court. *Portland Ry. Co. v. Oregon R.R. Comm.*, 229 U.S. 397, 412 (1913). Therefore, the question is whether under these facts, the California Court of Appeal properly applied this Court's takings decisions to reach its conclusion that there was no temporary taking of the Buckleys' lot.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IN *BUCKLEY* CORRECTLY APPLIED EXISTING TAKINGS LAW IN CONCLUDING THAT THERE WAS NO TEMPORARY TAKING

A. The Court of Appeal in *Buckley* Relied on Substantial Evidence that the Coastal Commission was Pursuing Legitimate State Interests and had not Deprived the Buckleys of Economically Beneficial Use of their Land.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016, and then again in *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), this Court reaffirmed its statement in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that land use regulation is not a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land. If a government agency shows that in the course of its land use regulation it pursued legitimate public interests and did not deny all economically productive use of the land it was regulating, it cannot have engaged in a compensable taking. That is exactly the *Buckley* case.

Section 30610.1 of the California Public Resources Code authorized the Coastal Commission to designate specific areas in the coastal zone where construction of single-family residences would have no potential "for significant adverse impacts on highly scenic resources of public importance, on environmentally sensitive areas, on prime agricultural lands currently in production, or on public access to or along the coast." In those areas designated by

the Coastal Commission, no coastal development permit would be required for a single-family residence. The exempt area must also be a legal lot meeting the size and use designations of the applicable general plan.

The Coastal Commission designated the front portion the Buckleys' lot as exempt, but not the rear portion in the ravine because the ravine was an environmentally sensitive area. The trial and appellate courts said that the Coastal Commission erred by bisecting the Buckleys' lot into exempt and non-exempt parts. The appellate court reasoned that the Legislature had not authorized the splitting of lots into exempt and non-exempt parts and by exempting part of the Buckleys' lot, the Coastal Commission had forfeited its jurisdiction over the remainder. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th at 188-90.

Nonetheless, the Coastal Commission had been pursuing a legitimate governmental purpose by asserting jurisdiction over the rear portion of the lot that was an environmentally sensitive area. It believed that it could accomplish this goal by bisecting the lot and was told by the court that it had misapplied the statute. The delay was the product of the legitimate use of the judicial process to resolve the Coastal Commission's legitimate dispute with the Buckleys over how this exemption should have been applied to their lot. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th at 200-01.

Based on its exhaustive review of the factual record, the Court of Appeal concluded that development of the Buckleys' lot was not stymied by the Coastal Commission's mistaken assertion of jurisdiction over the rear portion. The Buckleys were free to build their house on the front portion

of their lot. This was the most important part of their development plans and the only thing that they wanted to do in the first place. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th at 194-97. They were hardly denied all economically beneficial or productive use of their land. Under this Court's temporary takings analyses, there is no taking where government, acting in pursuit of legitimate public interests when engaging in land use regulation, does not deny all economically productive use of the land. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 127; and *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. at 321.

B. The Delay was the Product of Normal Delays in the Regulatory Process.

The Court of Appeal in *Buckley* rested its decision on the facts showing that the Buckleys retained the ability to build their house on the front portion of their lot, which was their primary goal in developing this residentially zoned lot. The Buckleys' decision not to build the house, not any denial by the Coastal Commission of a permit to build, kept the property from being developed while the issue of the Coastal Commission's jurisdiction over the planned grading in the rear of the lot proceeded through the judicial process. Part of that process included the California Supreme Court's order to the Court of Appeal to reconsider its decision in light of *Landgate*. The Court of Appeal's discussion of *Landgate* was, at best, ancillary to its independent, fact-based finding that there were no grounds for a takings claim. This ancillary basis, nonetheless, is consistent with the teaching of *First English* that normal delays in the pursuit of legitimate regulatory goals do not constitute takings.

In *First English*, this Court assumed that a Los Angeles County ordinance prohibiting any building on the church's land located in a flood plain temporarily denied the church all use of its property. The Court then held that if this were so, the Just Compensation Clause requires compensation for that temporary taking. The Court limited its holding to the assumed fact situation. It expressly did not include within the scope of its holding denials of use resulting from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 313 and 321.

First English did not deal with the inevitable delay in development that occurs while a regulatory agency asserts jurisdiction and requires a permit. This issue already had been addressed in *Riverside Bayview Homes*. There, this Court determined that neither the imposition of a permit requirement nor the denial of a permit necessarily causes a taking. Only after a permit is denied and the denial prevents all economically viable use of the property is there a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 127.

Since *First English*, several courts, including the California Supreme Court in *Landgate*, have addressed whether a delay caused by a regulatory agency's mistaken assertion of jurisdiction or application of law is a taking or a "normal delay." In light of *First English* and other takings cases, including *Riverside Bayview Homes*, these federal and state courts have concluded that delays in development until judicial intervention rectifies a regulatory agency's mistake are among the "normal delays" to which this Court was referring in *First English*. *See, e.g., Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800-03 (Fed. Cir. 1993) (no

taking where Army Corps of Engineers mistakenly asserted permit jurisdiction by issuing cease and desist order and development "effectively stopped" until court corrected mistake); *Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1257 (N.H. 1992) (no taking for delay where erroneous planning board decision declaring lot unsuitable for residential development was ultimately set aside by court, noting that appeals to the courts of mistaken agency decisions are part of the governmental decision making process); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass. 1992), *cert. denied*, 508 U.S. 909 (1993) (delay caused while seeking and obtaining judicial invalidation of municipal regulation beyond the authority of city to adopt not a taking); *Lujan Home Builders, Inc. v. Town of Orangetown*, 568 N.Y.S.2d 850, 851 (N.Y. Sup. 1991) (no taking for developmental delay while securing judicial relief from erroneous planning board decision); and *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.*, 33 Cal. App. 4th 211, 221-22, 39 Cal. Rptr. 2d 266 (1995) (no taking where agency's mistaken assertion of jurisdiction overturned by court).

The California Supreme Court in *Landgate*, after citing all and discussing most of the above cases, concluded that certain errors, ones that involve the passage or enforcement of a law or regulation that deprives property of all value, are compensable takings under the teaching of *First English*. "But government land use regulations and decisions . . . which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property under the Supreme Court's doctrine reviewed above." *Landgate*, 17 Cal. 4th at 1020. If government had to respond in damages for a taking for the delay consumed

by every successful judicial challenge to a regulatory agency's invocation of jurisdiction or application of a statute or regulation, the agency would be loath to act for fear of absolute liability for a good faith mistake. Faced with the choice of having to pay damages for the delay or applying a law or regulation in favor of the developer but contrary to what it may reasonably believe to the legitimate pursuit of regulation, it may choose the former, to the public's detriment. *First English* teaches that unless the agency is acting arbitrarily by failing to advance legitimate state interests, or denies conclusively and absolutely all value to property (*see Dolan v. City of Tigard*, 512 U.S. at 385), it is not temporarily taking property by mistakenly asserting jurisdiction and causing a delay in development until the mistake is corrected by the courts.

There was no taking in this case. The Coastal Commission and the Buckleys pursued the judicial remedies that both were entitled to pursue to obtain a final determination on the propriety of the Coastal Commission's assertion of jurisdiction over the grading on the rear portion of the lot in order to preserve environmentally sensitive habitat. The parties had a legitimate jurisdictional dispute over the pursuit of a legitimate goal under the Coastal Act by the Coastal Commission. The Coastal Commission's good faith legal mistake did not turn into a temporary taking the delay required to settle this dispute through judicial intervention.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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